No. 78-1870

IN THE

Supreme Court of the United States

October Term, 1979

WHIRLPOOL CORPORATION,

Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AND INTERNATIONAL UNION UAW AS AMICI CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C.

ELLIOTT BREDHOFF
General Counsel, IUD
1000 Connecticut Ave., N.W.
Washington, D.C.

JOHN FILLION
General Counsel, UAW
8000 E. Jefferson Avenue
Detroit, Michigan

GEORGE H. COHEN
ROBERT M. WEINBERG
1000 Connecticut Ave., N.W.
Washington, D.C.

LAURENCE GOLD
GEORGE KAUFMANN
MARSHA BERZON
815 16th Street, N.W.
Washington, D.C.

3 3 PRINTED IN USA

AUTHORITIES

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1870

WHIRLPOOL CORPORATION,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INDUSTRIAL UNION DEPARTMENT, AFL-CIO AND INTERNATIONAL UNION UAW FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the Industrial Union Department, AFL-CIO (IUD), and the International Union UAW respectfully move this Court, pursuant to Rule 42(1) of the Rules of this Court, for leave to file the accompanying brief as *amici curiae* in support of the position of the respondent in this case. The petitioner has refused its consent to the filing of said brief.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104

national and international labor organizations representing approximately 13,500,000 employees throughout the United States.

The Industrial Union Department, AFL-CIO (IUD) is a department of the AFL-CIO composed of 56 national and international unions representing approximately 6,000,000 employees in the industrial sector of the economy.

The International Union UAW which represents approximately 1,600,000 employees is the largest industrial union in this country.

This case concerns the extent to which the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, protects employees who face an imminent danger that threatens life or limb. The interest of working men and women and of their union representatives in the question presented is patent and the AFL-CIO, IUD and UAW therefore seek this opportunity to state their views on that question.

ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The attached brief *amici curiae* is devoted to three points each of which is stressed in the brief filed with the consent of the parties by the Chamber of Commerce of the United States as *amicus curiae*.

In part I of our brief we refute through the facts of the decided cases in point the Chamber's contention that "in reality employees are never faced with * * * a Hobson's choice between jobs and safety" (COC Br. 2-3.) Then in part II of our argument we show that § 13, OSHA, the Act's imminent danger provision, on its face belies the argument made by the Chamber and by Petitioner that "Congress

specifically rejected" (COC Br. 3) the premise that employees would ever be faced with that Hobson's choice. In the final section of our brief we demonstrate that contrary to the Chamber's contentions the Secretary's regulation is entirely consistent with the national labor policy and with the law as it has developed under the National Labor Relations Act.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C.

Elliott Bredhoff
General Counsel, IUD
1000 Connecticut Ave., N.W.
Washington, D.C.

John Fillion
General Counsel, UAW
8000 E. Jefferson Avenue
Detroit, Michigan

George Cohen
Robert Weinberg
1000 Connecticut Ave., N.W.
Washington, D.C.

Laurence Gold
George Kaufmann
Marsha Berzon
815 16th Street, N.W.
Washington, D.C.

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1870

WHIRLPOOL CORPORATION,

Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AND INTERNATIONAL UNION UAW AS AMICI CURIAE

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

SUMMARY OF ARGUMENT

I. The Chamber of Commerce denies that the Secretary of Labor's regulation at issue "is necessary to eliminate the Hobson's choice between jobs and safety"; according to the Chamber, "in reality, employees are never faced with such a choice" (COC Br. 2, 3). The facts of the cases brought by the Secretary under the regulation belie the Chamber's soothing assurances: in each of the cases summarized one or more employees was directed to perform work which

placed them in immediate danger of death or serious injury and were discharged or otherwise disciplined for refusing to perform that work.

II. The Chamber errs also in asserting that "Congress specifically rejected" the premise that employees are faced with that Hobson's choice (COC Br. 3). The very Congressional debate on which the Chamber and Petitioner rely to contend that the Secretary's regulation violates the Congressional intent resulted in the adoption of § 13 of OSHA which provides that the Secretary of Labor may obtain an injunction when employees do *not* voluntarily abate imminent dangers. And § 13(c) provides that when a Labor Department safety inspector finds an imminent danger exists "he shall inform the affected *employees* and employers of the danger in that he is recommending to the Secretary that relief be sought" (emphasis added). The unmistakable purpose of this notice provision is to provide employers the opportunity to immediately take whatever action is necessary to end the danger; and failing such employer action to permit "affected employees," upon being advised of their peril to take whatever action is necessary to remove themselves from the danger.

The opponents of the Daniels bill which was reported out of the House Labor Committee objected to empowering a safety inspector to shut down a plant, and to enabling employees to "strike with pay." But it would be incongruous to suppose that Congress, having concluded the debate by providing for judicial proceedings and for notification by the inspector to the employees as well as to the employer, intended to "relegate the employees to * * * a procedure too slow to be effective." (Cf. *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270, 286-287.)

In *Mastro Plastics* the Court refused to construe a provision of the National Labor Relations Act (NLRA) to reach "incongruous" results inconsistent with the NLRA's basic policy. That case provides an instructive analogy: if the inspector notifies employees that the "roof [is] about to collapse or a boiler about to explode," and the employer takes no steps to protect the employees, Congress could not have expected the affected employees to man their work stations and there await their fate or to be subject to discharge if they refuse to do so. This would be wholly antithetical to the policy of OSHA declared in § 2(b), and would require the employees to suffer because the employer has breached his basic duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; * * *." (§ 5(a)(1), OSHA.)

III. The Chamber of Commerce contends that the Secretary's regulation is inconsistent with the national labor policy as embodied in the NLRA. This claim rests on misunderstandings of the regulation and of the NLRA.

The regulation does not violate the national labor policy which encourages free collective bargaining. It simply effectuates the policy of OSHA which, like many other federal statutes establishes as a matter of public policy standards which provide a floor from which bargaining may proceed.

The Chamber's assertion that the regulation embodies a "subjective" standard is refuted by the language of the regulation itself, which establishes a "reasonable person" standard limited to urgent situations involving a real danger of death or serious injury. Thus, both in approach and in scope, the regulation is consistent with § 502 of the LMRA.

The Chamber also misstates the law under § 7 of the NLRA: *Labor Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 16 expressly rejected the proposition that the exercise of § 7 rights by employees is conditioned on their good faith. And while "a single employee's efforts to secure compliance with job safety laws" constitutes concerted activity under § 7 of the NLRA (COC Br. 33), the Secretary's regulation extends that right to workers who are not protected by the NLRA. And it is entirely consistent with Congress practice to provide concurrent federal remedies under the NLRA and other statutes. (See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36.)

The Secretary's regulation accords also with the practice of the parties in negotiating agreements and of arbitrators in deciding grievance disputes. The classic statement is that of the late Dean Shulman, the permanent umpire under the Ford Motor Co.—UAW agreement:

> The employee must normally obey [management's] order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not take it on himself to disobey. To be sure one can conceive of improper orders which need not be obeyed. An employee is not expected to obey an order to do that which would be criminal or otherwise unlawful. He may refuse to obey an improper order which involves an unusual hazard or other serious sacrifice. [*Ford Motor Co.*, 3 L.A. 779, 780.]

ARGUMENT

I. *The Secretary's Regulation Provides Needed Protection to Employees Against the Hard Choice Between Loss of Their Jobs and Risk of Serious Injury or Death Arising from Imminent Danger Situations at the Workplace.*

The Chamber of Commerce declares it to be important to its members to dispute what it calls the "hyperbolic assessment" that the Secretary's "regulation is necessary to eliminate the Hobson's choice between jobs and safety." (COC Br. 2-3.)[1] And, while the Chamber contends that this proposition "is untrue because, in reality, employees are never faced with such a choice" (COC Br. 3), its opposition to the Secretary of Labor's regulation at issue is at least some evidence of its own recognition that there will be occasions in which employees are faced with the "Hobson's choice" which alone triggers the employees' right to refuse to work under that regulation. But, the best evidence of "reality" is provided by the facts of this and other cases in which the Secretary has actually applied the regulation.

We begin with the facts of the present case: In its statement of the case Petitioner describes in minute detail the guard screen on which the employees who were disciplined refused to walk, and observes that neither those individuals "nor any other employee had refused to walk on the screen prior to July 10, 1974." (Pet. Br. 5-7.) Only after more than two and a half pages of the statement does Whirlpool relate that:

> On June 28, 1974 an employee fell from a section of guard screen, and thereby sustained fatal injuries. [Pet. Br. 8.]

The Company it appears understood the significance of that death at the time. For Petitioner directed that no one walk on the guard screen and developed an alternative Vertalite procedure for cleaning the guard screen. The Com-

---

[1] "COC Br." refers to the brief *amicus curiae* of the Chamber of Commerce; "Pet. Br." refers to the brief of the petitioner Whirlpool Corp.

pany does not state that this procedure was inadequate or otherwise explain why it was necessary—if it was—that in the face of this directive employees be again asked to walk on the screen. And the sequence of events shows that the death of their fellow-worker explains why two employees who had previously been willing to walk on the guard screen (notwithstanding other prior accidents) refused when, for the first time after that tragedy, they were ordered to do so. And it is the discipine of these individuals, rather than any perception that the work would be safe which best explains why there were no additional refusals to walk on the guard screen on July 10 or thereafter, an occurrence which petitioner would apparently treat as a tacit admission against interest by the employees. (Pet. Br. 7.) We are thankful that no additional deaths or serious injuries resulted, but it is more to the point that neither the two employees, nor the supervisor who directed them to walk on the guard screen, had any assurance that they would not meet such a fate. The District Court found:

> The defendant attempted to prove at trial that the complainants walked off their jobs not because they felt it was unsafe, but rather because they wanted an increase in pay for performing such work. The Court, however, is not willing to accept this contention and expressly finds that the employees refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm. This is supported by the fact that the foreman was not willing to allow them to use the Verta-lite procedure for cleaning the screen. Said procedure was an alternative to walking the screen developed after Mr. Cowgill's death. Furthermore, given that death, it is perfectly understandable that surviving employees would be reluctant to subject themselves to the possibility of a similar accident. The Court further finds that the threat of death or serious bodily harm was real and not something which existed only in the minds of the employees. While the defendant had begun to replace the original mesh panels of the screen with panels constructed of heavier gauge metal mesh having spiral wire connections, at the time in question only about one-third of the entire screen had been replaced. Certainly the fact that a man had fallen through the screen and been killed is the strongest possible evidence that it was unsafe and dangerous. Thus the Court finds that the job of cleaning the guard screen did present a danger of death or serious bodily harm. [Pet. App. 44-45.][2]

In *Marshall* v. *Daniel Construction Co. Inc.*, 563 F.2d 707 (C.A. 5) cert. denied 439 U.S. 880, Judge Wisdom described, in dissent, the facts alleged in the complaint:

> Daniel Construction Company employed Jimmy Simpson as an ironworker connecting structural steel in the construction of tall buildings. The job required fitting into place heavy steel beams with the aid of a crane. One windy day Simpson was working 150 feet above the ground. The wind grew so strong that it imperiled his life. He came down from high on the steel skeleton where he had been working. So did the rest of his crew. A foreman ordered the crew to return to work. Simpson refused. He was fired." [*Id.* at 717.][3]

In *Usery* v. *Babcock & Wilcox Co.*, 424 F.Supp. 753 (W.D. Mich.),

---

[2] While petitioner challenges the District Court's findings at great length, that argument is entirely improper because it is not fairly encompassed in the question presented by the petition for certiorari, which was limited to the validity of the Secretary of Labor's regulation. (Pet. 2; contrast Pet. Br. 5). In any event, petitioner "could not in this case meet its heavy burden under the 'two-court rule.'" (*United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, quoting *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.)

[3] The majority opinion did not describe the circumstances that caused the discharged employees' refusal to work.

> [S]ix pipefitters employed by the defendant were required to attach valves to the underside of a hopper assembling weighing many tons and they refused, claiming that the hopper was a suspended load and that it was dangerous to work under it." [*Id.* at 754, n. 1.]

In *Marshall* v. *Seaward Construction Company, Inc.*, 7 OSHA 1244 (D.C.N.H., March 28, 1979), the facts were these:

> In April of 1977 [the employer] was performing certain construction work on an interstate bridge over the Piscataquag River • • •
>
> On April 9, 1977, the defendant's superintendent, Anderson, instructed Purrington to proceed to the edge of the bridge to burn off some rivets in preparation for the welding of jacking pads. It was extremely windy, and Purrington refused to perform this work because he felt the high winds would place him in danger. He was immediately discharged, and requests were then made respectively of Schnurbush and McPhillip to perform the work, and upon their refusal, grounded also on the danger of working on the bridge in high winds, they were likewise discharged. Purrington discussed the incident with the engineer present on the job site who concurred with his assessment of the dangers involved. He then went immediately to the defendant's office in Kittery but, as it was a Saturday, this office was closed. Purrington then returned to his home and subsequently filed a complaint with OSHA. [*Id.* at 1245.]

Thus, having witnessed the discharge of their fellow employee Purrington for refusing to work on the bridge in the high winds, Schnurbush and McPhillip were squarely confronted with "the Hobson's choice between job and safety" which the Chamber of Commerce proclaims employees need never face. (COC Br. 2-3.)

The directions to the employees that they work under the conditions just described and the discharge and other discipline for refusals to do so may perhaps be explained on a premise other than "that employers operate in callous disregard for the safety of their employees" (COC Br. 3). For example, employers may have different perceptions of the risk involved than the employees whose lives are at hazard. And while it may be the policy of employers generally to value the safety of their employees above the immediate demands of production, the facts of the foregoing cases show, at the very least, that front-line supervisors sometimes have a different order of priorities, that they give on-the-spot orders to employees to perform life-risking labor, and that higher level management too often chooses to enforce the supervisor's decision rather than the more benign principles stated in the Chamber's brief.[4]

---

[4] Another striking example is provided by the facts of a recent decision of the National Labor Relations Board, *Sargent Electric Company*, 237 NLRB No. 182, 99 LRRM 1165. The general foreman on a construction project discharged four employees for refusing to perform welding on the top of a silo under the following conditions:

> This work had to be done on a slippery working surface 20-25 feet in diameter, at a height of 94-100 feet above ground which immediately sets it apart from construction work performed on the ground, or while standing in a solid, conventional building that is under construction. The top of the silo was newly painted metal, made slippery by puddles of water, the forming of ice and the downfall of snow. The only protection that the line handlers had from being blown off the top by the predicted high winds or from slipping and falling off, was a waist high handrail. The conditions under which the welder had to work out of the boatswain's chair could scarcely be more dangerous. Greenwood's description of how he had to mount the boatswain's chair from the top of the handrail was

II. *The Statute Shows on Its Face That the Secretary's Regulation Protecting Employees Against Being Required To Choose Between Their Jobs and Safety in "Imminent Danger" Situations Effectuates Congress' Intent.*

We have seen that notwithstanding the Chamber's soothing assurances, the regulation in issue is necessary to protect employees from "the Hobson's choice between jobs and safety" (COC Br. 3). And the Chamber is likewise in error in stating that "Congress specifically rejected" the premise that employees would be faced with that choice. (COC Br. 3.) This is shown by the product of the very debate on which the Chamber and Whirlpool rely—§ 13 of OSHA, the provision that treats with situations in which employers do *not* voluntarily abate imminent dangers. Predictably there is

akin to a kamikaze pilot taking off. Sitting in the best of boatswain's chairs at heights of 94-100 feet to a low of 74-80 feet above ground, with high winds blowing him about, snow and ice descending upon him, trying to use a welding torch, or an acetylene torch, while adjusting his mask, is by any standard of objective evidence, proof that work was being done under abnormally dangerous conditions. [*Id.* at ALJ Dec. 8; footnote omitted.]

The temperature and wind conditions were as follows:

> The National Weather Services Surface Weather Observations at the Greater Pittsburgh Airport show that the temperature for Monday [December 10] ranged from 23° F at 1 a.m. to 30° F at 7:55 a.m. to 15° F at 11:58 a.m., to 9° F at 3:58 p.m. The same reports show a wind speed of 11, 13, 23 and 25 knots for the same time periods, with 1.9 inches of snow falling intermittently during this span of time. [*Id.* at 5, n. 7.]

In his testimony, General Foreman Huchestein "justified ordering the electricians up on the silo under the weather conditions of January 10 by stating 'We run a construction job, and it's not like home.' " (*Id.* at 6.)

not a suggestion in that debate that employers could, on the pain of discharge or discipline, require employees to work in the face of such abnormal dangers. Rather, that debate concerned the extent to which employees should have protections over and above the mere right to refuse to work in life-threatening work situations and shows that Congress contemplated that the Act would protect employees who exercise that right.

In both Houses, bills were introduced providing that an OSHA inspector who finds that an imminent danger situation exists would have the power immediately to issue an order prohibiting the employer from exposing employees to that danger.[5] In the House, the assignment of such power to individual OSHA inspectors became a subject of major controversy. Opponents of the provision voiced strong objection to permitting such low level bureaucrats to exercise a federal power that might encompass the shutting down of a significant portion of an employer's operation; they contended that instead the power should reside in the federal courts.[6] That was the limit of their concern with this provision. The opponents did not disagree with the basic proposition that employees should not be exposed to imminent life-threatening dangers. They stated that "the Government

[5] H.R. 16785 (hereinafter "the Daniels bill"), § 12, (Leg. Hist. 721, at 742-743); S. 2193, as reported (hereinafter "the Williams bill"), § 11, (Leg. Hist. 204, at 262-264). Both bills limited the length of time such an order could remain in effect, with the Daniels bill providing for a maximum of five days, § 12(a), (Leg. Hist. 742), and the Williams bill a maximum of seventy-two hours, § 11(b), (Leg. Hist. 264). Both bills also authorized the Secretary to seek appropriate injunctive relief in federal court to abate the danger. (Daniels bill, § 12(b), (Leg. Hist. 742-743); Williams bill, § 11(a), (Leg. Hist. 262-263).)

[6] Leg. Hist. at 884-885, 992.

should . . . have the power to abate a bona fide potential disaster."[7] And the opponents contended that "in case a roof was about to collapse or a boiler about to explode" employers would not expect employees to remain at their work stations.[8]

Thereafter, the House adopted a substitute bill that contained an imminent danger provision that met the objections that had been expressed by the opponents. That provision, which in all pertinent respects ultimately was enacted into law as § 13 of the Act, provided that the courts, rather than inspectors, would have the power to order an employer to shut down an operation or process posing an imminent danger to employees.[9] The imminent danger provision in the substitute bill necessarily created a delay from the time the inspector determines the presence of the hazard until an injunction has been applied for and the matter has been resolved by a court. Congress anticipated this additional time would be short.[10] Nevertheless, the substitute bill required that:

> as soon as an inspector concludes that conditions or practices [constituting an imminent danger] exist in any place of employment, he shall inform the affected *employees* and employers of the danger and that he is recommending to the Secretary that relief be sought.[11]

The unmistakable purpose of this notice provision is to pro-

---

[7] Additional Minority Views of Representatives Scherle, Ashbrook, Eshleman, Collins, Landgrebe, and Ruth, (Leg. Hist. at 886).

[8] Leg. Hist. at 885.

[9] H.R. 19200, § 12, (Leg. Hist. 763, 796-797) (the "Steiger-Sikes Bill").

[10] Leg. Hist. 992.

[11] H.R. 19200, § 12(c), (Leg. Hist. 797 (emphasis added)).

vide employers the opportunity to immediately take whatever action is necessary to end the danger; and failing such employer action to permit "affected employees", upon being advised of their peril to take whatever action is necessary to remove themselves from the danger. Having specifically required the notification of employees, Congress must have intended this natural result. If the inspector notifies employees that the "roof [is] about to collapse or a boiler about to explode," and the employer takes no steps to protect the employees, Congress could not have expected the affected employees to man their work stations and there await their fate. And, of course, assuming the same facts, Congress must have also contemplated that employees confronting a life-threatening danger prior to the arrival of the government inspector at the workplace would also be able to protect themselves without being subject to discharge or discipline.

Congress "declare[d] it to be its purpose and policy *** to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources ***." (§ 2(b), OSHA.) And Congress made it the basic duty of every employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; ***." (§ 5(a)(1), OSHA.) The Act as a whole and the Secretary's regulation at issue in this case are in complete harmony with the Congressional intent expressed in these provisions.

Moreover, while the opponents of the Daniels bill objected to empowering federal inspectors to shut down operations, no one suggested that the employees' right to refuse to work

in the face of imminent danger to life or limb is subject to the same objections. And, the two situations are entirely different.

First, the objections of the opponents were based on their views as to the proper exercise of power by the federal government, and the constitutional restraints applicable thereto.[12] By their terms, these objections do not apply to the actions of employees.

Second, the opponents suggested that inspectors, who themselves have nothing at stake, might sometimes too readily issue shut-down orders. But an employee who exercises the right to refuse to work *loses pay* as a result. And, he is not protected by OSHA from the risk of discipline, including discharge, for insubordination unless he can establish after the fact that his action met the strict requirements of the Secretary's regulations.

On the other hand, it is not to be supposed that Congress, having concluded the debate by providing for judicial proceedings and for notification by the inspector to the *employees* as well as to the employer, intended to "relegate the employees to *** a procedure too slow to be effective." (Cf. *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 286-287.)

In *Mastro Plastics* the issue was whether § 8(d) of the NLRA, which expressly denies status as an "employee" to any individual who engages in a strike within the 60-day period prior to the termination of a collective agreement unless specified notices have been filed, is applicable to a strike within that period to protest the employer's unfair labor practices. This Court held, notwithstanding the literal

[12] See, e.g., Leg. Hist. 886, 425, 458.

language of § 8(d), that that provision does not apply under those circumstances. The Court was heavily influenced by the fact that an alternate "construction" would produce "incongruous results":

> The [petitioner employer] concedes that prior to the 60-day negotiating period, employees have a right to strike against unfair labor practices designed to oust the employees' bargaining representative, yet petitioners' interpretation of § 8(d) means that if the employees give the 60-day notice of their desire to modify the contract, they are penalized for exercising that right to strike. This would deprive them of their most effective weapon at a time when their need for it is obvious. Although the employees' request to modify the contract would demonstrate their need for the services of their freely chosen representative, petitioners' interpretation would have the incongruous effect of cutting off the employees' freedom to strike against unfair labor practices aimed at that representative. This would relegate the employees to filing charges under a procedure too slow to be effective. The result would unduly favor the employers and handicap the employees during negotiation periods contrary to the purpose of the Act. There also is inherent inequity in any interpretation that penalizes one party to a contract for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer. [350 U.S. at 286-287.]

Here, too, the petitioner's construction "would relegate the employees to filing a [complaint] with the Secretary of Labor under a procedure too slow to be effective" to protect them from imminent danger to life or limb. As Judge Wisdom explained, dissenting in *Marshall* v. *Daniel Construction Co., Inc., supra:*

> Following his mandate to protect the American worker, the Secretary has filled a dangerous gap in the

Act. As the majority points out, the Act allows a worker to make a written request for immediate federal inspection whenever the workers believes himself to be in imminent danger. The Secretary must determine whether such an inspection is warranted. If he finds it is not, he must notify the complaining parties in writing. If he finds that it is, he must order an investigation as soon as practicable. The inspector then must determine whether imminent danger exists. If he finds that it does, he is required to inform the Secretary, who may bring an action in federal district court for an injunction. The employee may use a writ of mandamus, or its equivalent, to force the Secretary to act properly. While these events take place, the worker, presumably in imminent danger, has no relief according to the majority. In this case Jimmy Simpson would be required to stay on the high skeleton, handling heavy steel and attempting to balance himself, no matter how strong the winds became, or lose his job—until the district court issued an injunction. A literal reading of the statute in this situation may make its remedies tragically late. [563 F. 2d 707, at 718 (footnote omitted).]

Moreover, even as in *Mastro Plastics* the statutory construction which was rejected would have unduly favored employers over employees during negotiations for a new collective bargaining agreement (the situation dealt with by § 8(d)), so in this case petitioner's construction would strongly tip the balance against "preserv[ing] our human resources" (§ 2 of OSHA) by denying employees protection against discharge if they refuse to risk their lives by working. But above all, we submit that there is "inherent inequity" in any interpretation that enables one party (the employer) to penalize the other party (his employees) for refusing to risk their lives when it is the unlawful conduct of the employer—the failure to provide a safe working place

in accordance with § 5(a)(1)—which has created that risk. The equities favoring the employees are in fact much stronger here. And it is not, as it was in *Mastro Plastics,* a necessity here to override the literal language of the statute to reach the result which fairness manifestly requires.

III. *The Secretary's Regulation Is Entirely Consistent With the National Labor Policy of Which OSHA s a Part.*

(a) The Chamber of Commerce objects that the regulation in question "impos[es] through administrative fiat what parties are required to negotiate." (COC Br. 30.) The AFL-CIO, the IUD and the UAW yield to no one, and least of all to the Chamber of Commerce,[13] in their regard for the importance of "the practice and procedure of collective bargaining," which, under § 1(b) of the NLRA it is the policy of the United States to "encourage." But the Chamber's argument totally misconceives the relationship between OSHA, which the Secretary's regulation effectuates, and that policy.

It is true, of course, that safety and health matters, as "conditions of employment," are mandatory subjects of collective bargaining under § 8(d) of the NLRA since they are "plainly germane to the 'working environment.'" (*Ford Motor Co.* v. *NLRB,* 47 L.W. 4498, 4501 [May 14, 1979] quoting *Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203, 222 [Stewart, J., concurring].)[14] To leap, however,

---

[13] Compare, e.g., Brief for the Chamber of Commerce as amicus curiae in *Fibreboard Corp.* v. *Labor Board,* No. 14, Oct. Term, 1964.

[14] Cf. *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 379:

> Certainly industrial strife may as easily result from unresolved

from this recognition to the assertion that the Secretary is precluded from promulgating the present regulation under OSHA because to do so would "remove those traditionally bargainable subjects from the collective bargaining table" (COC Br. 31) is to ignore the basic relationship between OSHA and the NLRA or, more fundamentally, between the growing array of federal laws "dictat[ing] as a matter of law" (COC Br. 31) certain minimal substantive standards of protection for employees, and the policy favoring collective bargaining embodied in the NLRA. For, as the Court recognized in *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296:

> Federal law * * * created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement for a system made in response to that duty, * * * and federal law sets some outside limits * * * on what their agreement may provide * * *.

OSHA is but one of the statutes setting those "limits" which also include, among others, the Fair Labor Standards Act,[15] Title VII of the Civil Rights Act,[16] Title III of the Consumer Credit Protection Act, which limits the right of employers to discharge employees because of garnish-

---

> controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production and economic instability.

Gateway held that the national policy favoring arbitration for resolving disputes during the term of an agreement applies to health and safety disputes. Collective bargaining is, as Congress expressly declared in § 1(b) of the NLRA, the procedure for avoiding industrial strife and interruptions of commerce over unresolved labor disputes in the absence of an agreement.

[15] 29 U.S.C. § 201, *et seq.*

[16] 29 U.S.C. § 2000e, *et seq.*

ments,[17] and the Employee Retirement Income Security Act of 1974.[18] But these statutes do not, as the Chamber would have it, "remove these traditionally bargainable subjects from the collective bargaining table." (COC Br. 30.) Rather, they state minimum standards which must be respected, while permitting unions and employers to bargain over greater protections. Thus, for example, the point of *Alexander* v. *Gardner-Denver*, 415 U.S. 36, is that the statutory remedy provided in Title VII is not displaced by the fact that the complaining employee has a remedy under a collective agreement as well.

Indeed, so far as we are aware there is no case in this Court suggesting that there is a general principle that parties to collective bargaining may contract out of other federal laws. Of course, Congress can, expressly[19] or implicitly,[20] accommodate positive legislation to the terms of collective agreements. But there must be a predicate for accommodation in what Congress has said or done. And there is no evidence that Congress intended to effect such an accommodation of either OSHA in its entirety or the particular application of OSHA stated in the present regulation.

(b) The Chamber's further contention (COC Br. 33) that the Secretary's regulation invites conflict and inconsistency

---

[17] 15 U.S.C. § 1674

[18] 29 U.S.C. § 1001, *et seq.*

[19] See, e.g., § 703(h) of the Civil Rights Act of 1964 which is part of the definition of discrimination under that Act. See also *Teamsters* v. *United States*, 431 U.S. 324, 348, 355; *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81-83.

[20] See *Connell Co.* v. *Plumbers and Steamfitters*, 421 U.S. 616, 621-623.

with the NLRA law as it has developed is based on a misunderstanding of both the regulation and the NLRA law.

1. The Secretary's regulation at issue in this case is designed to protect an employee who is "confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace." (29 C.F.R. 1977.12(b)(2).) The regulation is drawn narrowly to encompass only the most exigent of circumstances, and the standard is *objective*, not subjective:

> The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. [*Id.*]

In addition, the regulation requires that the employee must have "no reasonable alternative," must be acting in "good-faith," and "where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition." (*Id.*)

Thus, the charge that the Secretary's regulation requires "only a subjective good faith belief" that an imminent danger exists (COC Br. 35) and that the regulation suffers from "inherent subjectivity" (COC Br. 2) is totally unfounded.

The Chamber likewise errs in asserting that the regulation and the "strike with pay provision" which was rejected in Congress are "virtually identical" (COC Br. 23), since the regulation, unlike the defeated provision as explained by Mr. Daniels, does not provide for pay if the employer does not assign the employee to alternative work.[21] Indeed, by saying that the decision below "does, in fact, set up the potential for a 'strike with pay' which Congress expressly rejected" (COC Br. 24) the Chamber backhandedly acknowledges that the regulation does not now so provide.[22] For the same reason, Whirlpool's observations (Pet. Br. 19-20) which are reproduced in the margin[23] have nothing to do with this case.

---

[21] The Daniels bill's "strike with pay" provision has nothing to do with the validity of the Secretary's regulation at issue in this case. The provision by its terms was not addressed to imminent danger situations. It was designed instead solely to deal with the problem of employee exposure over a period of time to "potentially toxic or harmful" substances. (Leg. Hist. 755-756.) Moreover, the controversy over the "strike with pay" provision concerned not whether employees had rights to leave their jobs but whether having left their jobs they had a right to "collect[ ] their paychecks for doing nothing." (593 F.2d at 731.)

[22] The language of the regulation at issue here, and 29 CFR § 1977.21 discussed at COC Br. 23-24 differ completely in this respect. Indeed, the precise terms of the Secretary's regulation governing "walkaround pay disputes" highlights that "pay" is the core provision:

> Employees should be able to freely exercise their statutory right to participate in walkarounds without fear of economic loss, such as the denial of pay for the time spent assisting OSHA compliance personnel during workplace inspections. Therefore, in order to insure the unimpeded flow of information to the Secretary's inspectors, as well as the unfettered statutory right of employees to participate in walkaround inspections, an employer's failure to pay employees for time during which they are engaged in walkaround inspections is discriminatory under section 11(c). [29 CFR § 1977.21.]

[23] "To afford individual employees absolute immunity—in terms of pay or discipline—from the effects of refusing a work assign-

2. The Chamber misstates the NLRA law in several respects:

First, the Chamber says that "As confirmed by this Court in *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962), section 7 protects strikes to protest unsafe working conditions *so long as there is good faith belief that such conditions exist.*" (COC Br. 33, emphasis added.) While the Chamber would perhaps prefer that the exercise of § 7 rights depend on the employees' good faith, § 7 does not so provide, and *Washington Aluminum* did not so hold. On the contrary, the Court there held that it was irrelevant that when the employees walked out, the employer "was already making every effort to repair the furnace and bring heat into the shop." (370 U.S. at 16.) The Court said "At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." (*Id.*) [24] In this respect the Secretary's regulation is narrower than the law under § 7 of the NLRA. Of course this does not mean that the regulation is superfluous, since its coverage is broader encompassing as it does individuals who are not "employees" under the NLRA, such as railroad and agricultural workers and supervisors.

---

ment would reflect monumental change in prevailing labor policy." (Pet. Br. 19.)

"But neither of these two sections [§§ 7 and 502 of the NLRA] has ever been construed to create a right to refuse work without loss of pay." (Pet. Br. 20.)

[24] See also *id.* at n. 12 quoting *Labor Board* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 344:

> The wisdom or unwisdom of the men, their justifications or lack of it, in attributing to respondent an unreasonableness or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute.

Second, the Chamber states, correctly, that the NLRB has repeatedly held that "a single employee's efforts to secure compliance with job safety laws" constitutes concerted activity under § 7 of the National Labor Relations Act. (COC Br. 33 citing *Alleluia Cushion Co.*, 221 NLRB 999 (1975).) But this statement is not complete: the Board has applied § 7 also where an employee refused to perform assigned tasks on safety grounds. (See *Pink Moody, Inc.*, 237 NLRB No. 7, 98 LRRM 1463.) As the court below noted (593 F.2d at 726, n. 23), however, some courts of appeals have taken a narrow view of "concerted activity." But even if, as we believe, the Board's position, and the Court of Appeals decisions accepting that position, are sound, the regulation at issue here provides valuable protection to individuals who are not protected by § 7. And the existence of concurrent rights under the NLRA and other federal legislation is neither novel nor undesirable. That was the basis for the precise holding of *Alexander* v. *Gardner-Denver Co.*, *supra.*

Third, the Chamber claims that the Secretary's regulation sets a standard that protects employees covered by a no-strike clause who refuse to work on safety grounds in situations in which the "employees cannot satisfy *** the criteria" of § 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (COC Br. 35.)

In *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, this Court rejected the position that "an honest belief, no matter how unjustified *** necessarily invokes the protection of § 502." (*Id.* at 386.) As the only two Courts of Appeal which §have addressed the issue have held, the proper inquiry under § 502 as construed in *Gateway* is whether "[the employee's] belief that the [condition] was unsafe was amply

supported by 'ascertainable, objective evidence.'" (*Banyard* v. *NLRB*, 505 F.2d 342 (C.A.D.C.); see also *Plain Dealer Publishing Co.* v. *Cleveland Typo Union*, 520 F.2d 1220 (C.A. 6.)) Thus, under § 502, "what controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'" (*Redwing Carriers*, 130 NLRB 1242; see also *Combustion Engineers, Inc.*, 224 NLRB 542).

The Chamber's argument that the regulation is inconsistent with § 502 is based primarily on its erroneous insistence that the regulation is "subjective" and its further irrelevant argument that § 502 is narrower than the Secretary's regulation because "a job may be *inherently* dangerous, although not abnormally so under section 502, and therefore outside its protection" (COC Br. 35, emphasis added).[25] Section of 13 OSHA and the Secretary's regulation deal only with conditions that are "*imminently* dangerous." The OSHA rule at issue applies only if the employee has "no reasonable alternative"—that is, if there is "insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." It would appear that the "abnormally dangerous" standard of § 502 and the "no reasonable alternative *** due to urgency" standard of the regulation screen out the same cases: "urgency" is unlikely to be found in a situation which is not "abnormal."

A "no-strike pledge may be violated with impunity"

[25] The *Philadelphia Marine Terminals* case cited at COC Br. 35, n. 23, however, provides no support for that proposition.

(COC Br. 35) to the extent that § 502 applies, because as was recognized in *Gateway Coal*, that is the provision's *precise purpose*. And since, as just shown the Secretary's regulation does not deviate from § 502's standard the Chamber's conflict argument must fail for it depends on the proposition that the regulation protects employees whose work stoppage "does not meet the section 502 criteria" (COC Br. 35).

(c) Indeed, far from undermining the collective bargaining the NLRA is designed to encourage the Secretary's regulation accords with the actual practice of employers and unions in negotiating collective agreements, and the decisions of arbitrators interpreting such agreements. Some collective agreements expressly provide that while disputes over safety are to be resolved through the grievance procedure of the agreement, the grieving employee may refuse to perform allegedly unsafe work until the grievance is finally resolved. (See, e.g., the agreement quoted in *Hanna Mining Co.* v. *United Steelworkers of America*, 464 F.2d 565 at 566 (C.A. 8) and the discussion thereof, id. at 576-78.) And even absent such an express provision the leading statement of the generally applicable rule, and of the exception thereto, is that of the late Dean Shulman, who was the permanent umpire under the Ford Motor Company agreement:

> The employee must normally obey [management's] order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not take it on himself to disobey. To be sure one can conceive of improper orders which need not be obeyed. An employee is not expected to obey an order to do that which would be criminal or otherwise unlawful. He may

> refuse to obey an improper order which involves an unusual hazard or other serious sacrifice. But in the absence of such justifying factors, he may not refuse to obey merely because the order violates some right of his under the contract. The remedy under the contract for violation of right lies in the grievance procedure and only in the grievance procedure. [*Ford Motor Co.*, 3 L.A. 779, 780.]

This exception has been applied time and time again by arbitrators and is now accepted as "a truism in the common law of the shop." (*Minnesota Mining and Mfg. Co.*, 59 L.A. 375, 378.) For example, in *Laclede Gas Co.*, 39 L.A. 833, 839, the arbitrator stated:

> The principle aplicable here is that an employee may refuse to carry out a particular work assignment, if at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employee has the duty, not only of stating that he believes there is risk to his safety or health, and the reason for believing so, but he also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief. In the case of dispute, as is the case here, the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so. This is so well understood that the chairman does not believe that the general acceptance of this principle requires documentation.[26]

[26] Another arbitrator has characterized *Laclede Gas* as "a particularly apt expression of the principles involved *** synthesized from many other awards." *A. M. Castle & Co.*, 41 L.A. 667, 670. And in *A. M. Castle* the arbitrator elaborated a point inherent in the *Laclede Gas* analysis but not explicated there:

> So long as [the employee] is sincere in his belief of danger, and so long as he makes a "reasonable" appraisal of the potential hazards, he is protected in his decision not to act, regardless of whether later on, in fact, it would be established that no hazard existed. [41 L.A. at 671.]

It is in the same spirit that the District Court in *Gateway Coal*, whose action was approved by this Court (see 414 U.S. 387-388), and the Court of Appeals in *Hanna Mining Co., supra* (see 464 F.2. at 569-570) required the respective employers to abate the unsafe condition pending arbitration.

CONCLUSION

For the above stated reasons the decision below should be affirmed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C.

Elliott Bredhoff
General Counsel, IUD
1000 Connecticut Ave., N.W.
Washington, D.C.

John Fillion
General Counsel, UAW
8000 E. Jefferson Avenue
Detroit, Michigan

George H. Cohen
Robert M. Weinberg
1000 Connecticut Ave., N.W.
Washington, D.C.

Laurence Gold
George Kaufmann
Marsha Berzon
815 16th Street, N.W.
Washington, D.C.